ORIGINAL

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1988

No. 88-1844

STATE OF ARIZONA,

Petitioner,

v.

JEFFREY LYNN IKIRT,

Respondent.

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS

Respondent, JEFFREY LYNN IKIRT, pursuant to Rule 46, Supreme Court Rules, asks leave to file the attached brief in opposition to the petition for a writ of certiorari without pre-payment of costs and to proceed in forma pauperis. The Respondent was represented by the Cochise County Public Defender's Office, of which the undersigned is a member, on appeal to the Court of Appeals and the petition for review to the Arizona Supreme Court. This representation was under a court appointment and Mr. Ikirt proceeded as an indigent in the State of Arizona before the Arizona Court of Appeals and Supreme Court.

RESPECTFULLY SUBMITTED this 9th day of June, 1989.

ROBERT ARENTZ
Cochise County Public Defender

BY: _____
ROBERT ARENTZ
Public Defender
and
JAMES L. CONLOGUE
Deputy Public Defender

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AFFIDAVIT

STATE OF ARIZONA)
)ss.
County of Cochise)

I, JEFFREY LYNN IKIRT, being first duly sworn, upon my oath, depose and state that I am the Respondent in the above-entitled cause; that in support of my motion to proceed without being required to repay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear:

1. That I am not currently employed, nor have I been employed since I was incarcerated by the State of Arizona as a prisoner in the Arizona Department of Corrections.

2. That within the last twelve months I have not received any income from any business, profession or self-employment, nor do I receive any interest, dividends, or other source of income.

3. That I have no checking nor savings account and the only cash with which I am possessed is of a minimal amount.

4. That I do not own any real estate, nor do I own any stocks, bonds, notes, automobiles, or other property of any value and I have no liquid assets whatsoever except as set forth in the preceding paragraph.

5. That I have no one who is dependent upon me for support.

I understand that a false statement or answer to any of the questions in this affidavit will subject me to penalties for perjury.

JEFFREY LYNN IKIRT

SUBSCRIBED AND SWORN to before me this 7th day of June, 1989.

Notary Public

My Commission Expires:

My Commission Expires Aug. 26, 1992

AFFIDAVIT

STATE OF ARIZONA)
)ss.
County of Cochise)

I, ROBERT ARENTZ, having first been duly sworn, state under oath that I am appointed counsel for the Respondent in this case; that in support of this motion to proceed without being required to pre-pay fees, costs, or to give security therefor, I state that Respondent was allowed to proceed in forma pauperis in the Arizona Court of Appeals and Supreme Court. The Respondent is currently unemployed and has just been released from the Arizona Department of Corrections in the custody of his mother.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

ROBERT ARENTZ

SUBSCRIBED AND SWORN to before me this 9th day of June, 1989.

Notary Public

My Commission Expires:

My Commission Expires Aug. 26, 1992

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1988

No. 88-1844

STATE OF ARIZONA

Petitioner,

vs.

JEFFREY LYNN IKIRT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. SHOULD THIS COURT GRANT CERTIORARI IN THIS CASE WHEN THE ARIZONA SUPREME COURT BASED ITS DECISION UPON THE INDEPENDENT STATE GROUND OF STATE STATUTE?

B. SHOULD THIS COURT GRANT CERTIORARI IN THIS CASE WHEN THE ARIZONA SUPREME COURT BASED ITS DECISION UPON THE INDEPENDENT STATE GROUND OF ARTICLE 2, SECTION 10 OF THE ARIZONA CONSTITUTION?

C. WAS THE ARIZONA SUPREME COURT CORRECT IN FINDING THAT THE PROSECUTOR'S COMMENT ON THE DEFENDANT'S ABILITY TO TESTIFY CONSTITUTED FUNDAMENTAL ERROR?

D. WAS THE ARIZONA SUPREME COURT CORRECT IN FINDING THAT THE PROSECUTOR'S COMMENT ON THE DEFENDANT'S ABILITY TO TESTIFY WAS NOT HARMLESS ERROR?

STATEMENT OF THE CASE

The Respondent will rely on facts as announced in the Arizona Supreme Court decision reported in State v. Ikirt, ____ Ariz. ____, 770 P.2d 1159 (1987) and appended to the Petition for Writ of Certiorari as Appendix 2. Where appropriate, in argument, Respondent will supplement those facts.

ARGUMENT

A. THIS COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE BECAUSE THE ARIZONA SUPREME COURT BASED ITS DECISION UPON THE INDEPENDENT STATE GROUND OF STATE STATUTE.

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) held that when,

> "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

Id at 1040-1041, 103 S.Ct. at 3476. In such a case, this Court will review the state court case unless it is made clear "by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." Id.

The threshold question in this case is whether the Arizona Supreme Court's decision rested primarily on federal law or was so interwoven with federal law that the state law basis for the decision is unclear. Only then does the requirement for a clear statement come into play.

In the present case, the Arizona Supreme Court reached the result it did on the basis of the Arizona Constitution and an applicable state statute. While a similar result may have been

reached under Griffin v. California, 380 U.S. 609 (1965), this does not mean that the Arizona Supreme Court was compelled to hold as it did on the basis of Griffin.

Prior to Griffin, this Court never reached the question whether the federal guarantee against self-incrimination prohibited adverse comment upon a defendant's failure to testify at his trial. Tehran v. United States, 382 U.S. 406, 412, 86 S.Ct. 459, 463 (1966). The reason being that since 1908 this Court refused to impose the Fifth Amendment privilege against self-incrimination on the states and the question never arose in federal court because 18 U.S.C. Section 3481 prohibited adverse comment upon a defendant's failure to testify in a federal criminal trial. Id.

During the period between 1908 and 1965 the question whether the state could comment on a state court defendant's failure to testify was controlled by state law. Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947). While some states allowed such comment during that period, Arizona, by statute, consistently prohibited it.

Arizona Revised Statutes (A.R.S.) Section 13-117(B) provides that "(t)he defendant's neglect or refusal to be a witness in his own behalf shall not in any manner prejudice him, or be used against him on the trial or proceedings." This statute has been continuously in effect in Arizona since before statehood. See, Arizona Penal Code 1901, Section 1112; Arizona Penal Code 1913, Section 1229; Arizona Revised Code 1928, Section 5179; Arizona Code 1939, Section 44-2704; and the former A.R.S. Section 13-163.

It is true that the Arizona Supreme Court has observed on occasion that Arizona's statutory protection against adverse comment was raised to the level of a constitutional guarantee after Griffin. See, State v. Fuller, 143 Ariz. 571, 694 P.2d

1185 (1985); State v. Pierson, 102 Ariz. 90, 425 P.2d 115 (1967). Presumably, this is primarily due to language in Griffin which substituted the words "Fifth Amendment" for the words "act" and "statute" in a quotation from Wilson v. United States, 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650 (1893) discussing the federal statute proscribing adverse comment. However, this does not mean that the statutory protection and the federal prohibition against self-incrimination are equivalent.

The proscription against drawing adverse inferences from a defendant's failure to testify is not a necessary corollary of the prohibition against self-incrimination. Commonwealth v. Torres, 17 Mass.App. 676, 461 N.E.2d 1231 (1984). It is a related, but distinct proposition. Id. This is evidenced by the fact that in most jurisdictions, including the federal jurisdiction, the proscription against adverse comment is found in statute. Further, in those jurisdictions in which comment was allowed prior to Griffin it was permissible to inform juries that a defendant had a constitutional right not to testify but that the jury could draw any inference it thought proper from the exercise of that right. People v. Modesto, 42 Cal.Rptr. 417, 398 P.2d 753 (1965); State v. Sandoval, 59 N.M. 85, 279 P.2d 850 (1955).

Griffin expanded the scope of the Fifth Amendment to encompass in large part the terrain previously occupied solely by A.R.S. Section 13-117. The same can be said for Griffin's effect on the federal statute. United States v. Robinson, ____, U.S. ____, 108 S.Ct. 864, 867 n.4 (1988). However, the fact that the Fifth Amendment is now "generally construed in a parallel fashion" with these statutory provisions, see, Id, does not mean that these provisions are equivalent.

The language of A.R.S. Section 13-117 is much broader than

the holding in Griffin. That there is no equivalency of the Arizona statute and the Fifth Amendment is shown in State v. Smith, 101 Ariz. 407, 420 P.2d 278 (1966). The Arizona Supreme Court stated that after Griffin v. California, they are concerned not only with a statutory right under Arizona law, but an individual's constitutional rights as well. The language in State v. Smith clearly and expressly indicates the independence of the separate rights upon which the present decision is based. See also State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980).

In addition, in State v. Marsin, 82 Ariz. 1, 307 P.2d 607 (1957) the Arizona Supreme Court recognized the differing scope of the statute and the constitutional prohibition against self-incrimination. After discussing the constitutional prohibition, the court went on to discuss the purpose and protection afforded by the statute. While the court found that the statute did not apply to the facts of that case, it is clear from the court's discussion that the two concepts are not equivalent.

In the present case, it appears clear that the prosecutor's comment violated defendant's rights under A.R.S. Section 13-117. Such would have been the Arizona Supreme Court's holding prior to Griffin and even in the absence of any constitutional provision which might also apply. A.R.S. Section 13-117, by itself, is sufficient to support the court's holding. Therefore, the statute provides an independent and adequate state law ground to support the judgment and any intervention by this Court would amount to nothing more than an advisory opinion.

One further point must be made in this regard. This Court recognizes the general rule of judicial restraint that when statutory construction can resolve a case, courts should not decide constitutional issues. New York v. Class, 475 U.S. 106, S.Ct. 960 (1986). Arizona adheres to this rule. State v.

Church, 109 Ariz. 39, 504 P.2d 940 (1973). From the rule, this Court may wish to infer that since the Arizona Supreme Court discussed both statutory and constitutional grounds, the statutory issue was insufficient to resolve the case and therefore the statute could not constitute an independent and adequate state ground. See Class at 108, 106 S.Ct. at 964.

Such an inference does not apply to the facts of this case. While the constitutional prohibition against self-incrimination and the statutory no comment rule are separate concepts, the statute cannot be discussed without considering the constitutional provisions. The statute was adopted to protect the constitutional privilege. Marsin at 4, 307 P.2d at 610. The statute has no place without the constitutional prohibition against self-incrimination. Therefore, the fact that these provisions are discussed in tandem raises no inference that the statute would not resolve this case on its own.

Further, the rule of judicial restraint discussed above has a double-edged effect in this case for the rule applies equally to this Court as it does to a state court. This Court has relied upon that rule to resolve doubts about the independence of state-law decisions in favor of an interpretation that avoids a constitutional question. Black v. Cutter Laboratories, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed.2d 1188 (1956). In the present case, the Arizona statute is sufficient to resolve the issue and this Court should avoid the constitutional question presented. Such was the Court's practice prior to Griffin when issues concerning adverse comments on a defendant's refusal to take the stand in federal cases was resolved on the basis of the federal statute. See, Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939).

The Arizona Supreme Court's decision in this case was based

on Arizona law. The decision does not rest primarily on federal law and it is not interwoven with federal law. The decision in this case would have been no different prior to Griffin when federal law would have been inapplicable. From a fair reading of the case it appears that Griffin was introduced into the opinion because the defendant relied on that case in presenting his argument to the court. No other federal authorities are cited in the opinion. Therefore, since federal law is not a significant part of the court's opinion, no statement concerning the compelling nature of the federal law is required. An independent and adequate state law ground supports the Arizona Supreme Court's decision.

B. THIS COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE BECAUSE THE ARIZONA SUPREME COURT BASED ITS DECISION UPON THE INDEPENDENT STATE GROUND OF ARTICLE 2, SECTION 10 OF THE ARIZONA CONSTITUTION.

In Michigan v. Long, 463 U.S. 1082, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), this Court clarified the role of State courts in phrasing independent state grounds. This Court will look to the language of the state court to determine if the decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds.

> "...we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." Michigan v.. Long, 103 S.Ct. at 3477.

As previously discussed, the Arizona Supreme Court's decision was based upon an Arizona statute and Arizona cases interpreting that statute, which predate Griffin v. California. In addition, the Arizona Court based its decision upon Article 2, Sec. 10 of the Arizona Constitution.

In its Petition for Writ of Certiorari, the State argues that Arizona courts have repeatedly held that Article 2, Sec. 10 is equivalent to the Fifth Amendment and provides no greater protection. The cases cited by the Petitioner do not support such a proposition.

State v. White, 102 Ariz. 162, 426 P.2d 796 (1967) states only that the variations of wording in the federal and state constitutions do not lead to different interpretations, not that Article 2, Sec. 10 does not afford greater protection. In State v. Marsin, 82 Ariz. 1, 307 P.2d 607 (1957), the Arizona Supreme Court stated merely that Article 2, Sec. 10 is consonant with like constitutional provisions found in nearly every state and with the Fifth Amendment. Marsin, certainly does not address the merits of the extent of protection given by the Arizona Constitution. State v. Fendler, 127 Ariz. 464, 622 P.2d 23 (1980) and State v. Superior Court (Gillilard), 149 Ariz. 601, 721 P.2d 149 (1986) are Court of Appeals cases that cannot express the Arizona Supreme Court's interpretation of the Arizona Constitution.

Petitioner also claims that State v. Pierson, 102 Ariz. 90, 425 P.2d 115 (1967) establishes an equivalency between the protection afforded by the statute and the Fifth Amendment protection applied in Griffin v. California. In Pierson the Arizona Supreme Court said only that the previously existing right under A.R.S. Sec. 13-163(B) (now Sec. 13-117) was extended to the level of a constitutional guaranty when Griffin v. California made the Fifth Amendment privilege against self-incrimination applicable to the states through the Fourteenth Amendment. The Arizona Supreme Court did not abandon a previously existing independent state ground by discussing Griffin v. California, and did not create any equivalency of

independent rights.

Contrary to the Petitioner's claim, the Arizona Supreme Court has treated Article 2, Sec. 10, of the Arizona Constitution more expansively than Federal courts have treated the Fifth Amendment. After Michigan v. Long was decided, the Arizona Supreme Court discussed the role of the Arizona Constitution in State v. Mauro, 159 Ariz. 186, 766 P.2d 59 (1988). Like many states after Michigan v. Long, Arizona has indicated clearly and expressly that in construing the State constitution they refer to Federal constitutional law as only the benchmark minimum constitutional protection. The Arizona Supreme Court has reiterated this policy often enough to satisfy Michigan v. Long guidelines and emphasize the independence of the Arizona Constitution.

In State v. Mauro, the Arizona Supreme Court found that in deciding the state constitutional issue, the court is not bound to the analysis and conclusions made by the United States Supreme Court.

The court also discussed this issue in Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984), finding that Article 2, Sec. 10 of the Arizona Constitution provided more protection than the U.S. Constitution. The court restated its clear and express intent, which also states the affect of Griffin v. California upon the present case:

> "We would ordinarily interpret art. 2 sec. 10 of the Arizona Constitution...in conformity to the interpretation given by the United States Supreme Court to the same clause in the federal constitution... The decisions of the United States Supreme Court are binding with regard to the interpretation of the federal constitution; interpretion of the state constitution is, of course, our province... We acknowledge, with respect, that decisions of the United States Supreme Court have great weight in interpreting those provisions of the state constitution which cor-

> respond to the federal provisions. We acknowledge that uniformity is desirable. However, the concept of federalism assumes the power, and duty, of independence in interpreting our own organic law. With all deference, therefore, we cannot and should not follow federal precedent blindly." Pool v. Superior Court, 677 P.2d at 271.

The reason for the Arizona Constitution providing greater protection under certain circumstances than the U.S. Constitution was addressed in State v. Hurley, 154 Ariz. 124, 741 P.2d 257 (1987). The court found that differing language or special Arizona traditions or customs may require it to interpret provisions of the Arizona Constitution more expansively than the interpretation given to the federal constitution.

Turning to the opinion of the Arizona Supreme Court in the present case, it is clear that the court utilized Griffin v. California as a persuasive authority, as it considered Barnes v. State, 630 P.2d 1221 (Nev. 1981) and Ex Parte Tucker, 454 So.2d 552 (Ala. 1984).

The Petitioner argues that it is important to stem the tide of misunderstanding before it increases in strength. This position is based upon the incorrect assertion that the Nevada Supreme Court in Barnes v. State and the Alabama Supreme Court in Ex Parte Tucker applied Griffin v. California differently to identical facts. A reading of Ex Parte Tucker shows that the Alabama Supreme Court did not base its decision upon either Griffin v. California or any federal constitutional right. That decision is founded only upon the Alabama constitution and cases interpreting that constitution.

The Arizona Supreme Court's treatment of Ex Parte Tucker clearly and expressly indicates that Griffin v. California was taken only as persuasive authority in a decision based upon independent state grounds. The court was faced with two foreign

state cases, the first based upon the Alabama constitution and the second based upon Griffin v. California and the U.S. Constitution. The court specifically rejected the case discussing Griffin in favor of the case based upon a foreign state's constitution, which was obviously only persuasive authority. The court rejected the Nevada case that limited the right pursuant to Griffin v. California, and held that Arizona independent state grounds are similar to Alabama's, which grant more expansive rights.

A close examination of the Arizona Supreme Court's decision in the present case reveals that it is based upon the independent state grounds contained in Article 2, Sec. 10, of the Arizona Constitution, as well as state statute.

C. THE ARIZONA SUPREME COURT WAS CORRECT IN FINDING THAT THE PROSECUTOR'S COMMENT ON THE DEFENDANT'S ABILITY TO TESTIFY CONSTITUTED FUNDAMENTAL ERROR.

Although the Petitioner frames the issue by stating that the prosecutor did not comment on the defendant's right to testify in the presence of the jury, the reverse is actually true.

The following occurred in the presence of the jury:

> "MR. BEHRENS: Well, Your Honor, I'm merely trying to lay foundation for the excited utterance exception to the hearsay rule.
>
> MR. BREW: Your Honor, I don't believe you can get the communication in the guise of laying the foundation. I think Mr. Ikirt is here." (emphasis added).

This argument occurred following testimony and a hearsay objection by the prosecutor. It does a great disservice to our jury system to suggest that jurors did not understand the meaning of that comment. The prosecutor stated his intent by the statement at a bench conference:

> "THE COURT: You're not going to get that in on excited utterance.

MR. BREW: He had to have an unavailable declarant, Your Honor. He's got an available declarant.

MR. BEHRENS: "I want to specifically object to Mr. Brew's indication that was calculated to indicate to the jury that Mr. Ikirt is here and that that relates to a possible comment upon a failure to take the stand if he chooses to. I therefore move for a mistrial on that basis.

MR. BREW: Your Honor, it's relevant. He's claiming hearsay exception, and we have an available declarant and that's one of the considerations.

THE COURT: Yes. But he, under 803--that is where the declarant is available.

MR. BREW: The only purpose I have making the statement is to indicate the declarant is available." (emphasis added).

The Petitioner argues that the remark was to the judge, not to the jury. The comment was made in the presence of the jury. The plain meaning of the statement was that the Appellant was present, available to testify and should testify, eliminating the need for hearsay from the witness.

In State v. Smith, supra, the Arizona Supreme Court found that effective innuendos raised by the prosecutor will naturally pressure the defendant into taking the stand to rebut the resulting implications. If, on the other hand, the defendant chooses to remain silent, then the very inferences of guilt which the Griffin case expressly sought to avoid are left to mar the trial.

The propriety of the prosecutor's statement must be considered in context. State v. Schrock, 149 Ariz. 433, 719 P.2d 1049 (1986) found that:

"To determine whether a particular agreement is improper, the statement must be examined in context to determine whether the jury would naturally and necessarily

perceive them to be a comment on the failure of the defendant to testify." 719 P.2d at 1054.

The jury must have naturally and necessarily perceived the comment with the prosecutor's intended meaning, which was the innuendo discussed in State v. Smith, supra.

It is true, the pertinent remark occurred during the trial proper rather than at argument. However, it is the character of the remark, and not the time it is made, which is controlling. In this case, the prosecutor's statement--"I think Mr. Ikirt is here"--was designed to mean Mr. Ikirt was present and was available to tell about what happened on May 14, 1984. As the prosecutor candidly admitted at the bench conference, that was precisely his intent. There is no real difference between a prosecutor's argument at the close of the case that a defendant did not testify, and a prosecutor's statement during the trial that a defendant is available and could testify. Both statements improperly shift to the defendant a burden that is not his.

The Petitioner argues that the comment was invited error, that it was a fair response to an evidentiary argument made by the defense counsel.

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981), states that normally a comment regarding a defendant's right to testify constitutes fundamental error unless it was invited.

Invited error occurs when the defendant first brings up the defendant's failure to testify. State v. Arredondo, 111 Ariz. 141, 526 P.2d 163 (1974).

The invited error doctrine provides that where remarks of the prosecuting attorney, even though improper, are invited or occasioned by an accused's counsel, or are in reply to or in retaliation for his acts or statements, they are generally not grounds for reversal. State v. Smith, supra.

In the present case, the defendant's attorney stated, after the prosecutor's objection, that he was attempting to lay a foundation for a hearsay exception. There were no comments regarding the defendant's ability to testify made before the prosecutor's statement. The improper comments cannot be considered invited error.

It is of no moment whether such an improper comment was intentional or accidental. State v. Rhodes, 110 Ariz. 237, 517 P.2d 507 (1974), appeal after remand 112 Ariz. 500, 543 P.2d 1129 (1976).

It is Arizona law that appellate courts should consider 1) whether the remarks called to the attention of the jurors matters that they would not be justified in considering in determining their verdict and 2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks. State v. Hallman, 137 Ariz. 31, 668 P.2d 874 (1983).

The Arizona Supreme Court found that under the facts of this case, the prosecutor's comments constituted uninvited fundamental error. The court held that Arizona law mandated a reversal of defendant's conviction. This Court should not disturb such a decision by a State court.

D. THE ARIZONA SUPREME COURT WAS CORRECT IN FINDING THAT THE PROSECUTOR'S COMMENT ON THE DEFENDANT'S ABILITY TO TESTIFY WAS NOT HARMLESS ERROR.

The state's case against Respondent rested entirely upon circumstantial evidence. State v. Ikirt, ____ Ariz. ____, 770 P.2d at 1160 and 1165. Respondent presented an alibi defense in which his mother, a friend, a former deputy marshal and a bar owner testified that Respondent was in Tombstone, Arizona and not at the scene of the arson near the time that the fire was set. Id at 1160. Respondent did not testify at the trial.

The Arizona Supreme Court reviewed the entire record upon Respondent's motion for reconsideration. Id at 1163 (citing A.R.S. Section 13-4035 which mandates such review). Based on that review, the court refused to accept the state's argument that the error in this case was harmless and the case was remanded to the superior court for a new trial. Id at 1165.

Petitioner renews its harmless error argument in this Court, relying on Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In Chapman, this Court held that an improper comment on a defendant's failure to testify could be harmless only if the reviewing court is able to determine that the error was harmless beyond a reasonable doubt.

In order to make a harmless error determination, the reviewing court must consider the entire record. United States v. Hastings, 461 U.S. 499, 509, n.7, 103 S.Ct. 1974, 1981, n.7, 76 L.Ed.2d 96. While this Court plainly has the authority to decide whether, based on the entire record, a constitutional error[1] was harmless under Chapman, this Court does so sparingly. Id at 510, 103 S.Ct., at 1981.

This Court is in precisely the position of the court below in addressing the issue of harmless error. See, Id at 509, n.8, 103 S.Ct., at 1981, n.8. This Court customarily accords great weight to a state court's findings in matters, such as the present one, which is largely based upon factual determinations. See, e.g., Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum,

[1]Respondent in no way concedes that the error in this case was constitutional rather than a violation of the Arizona statute. However, if this Court reaches the Chapman analysis, a constitutional error must have occurred.

Inc., 445 U.S. 97, 100 S.Ct. 937, 33 L.Ed.2d 233 (1980). This case should be viewed with this consideration in mind.

The present case is similar to Eberhardt v. Bordenkircher, 605 F.2d 275 (6th Cir. 1979). Eberhardt involved an improper comment on a defendant's failure to testify in a case based largely, though not exclusively, on circumstantial evidence in which the defendant presented an alibi defense. The Eberhardt court focused on several factors, germane to the current analysis, in finding that the error in that case was not harmless. Those factors are set forth below in the analysis of the present case.

The first factor involves the strength of the state's case. Here, the state's case was based entirely on circumstantial evidence. This fact alone strongly indicates that any error should not be considered harmless. See, Fontaine v. California, 390 U.S. 393, 88 S.Ct. 1229, 20 L.Ed.2d 154 (1968); Berryman v. Colbert, 538 F.2d 1247 (6th Cir. 1976).

A second related factor is whether the state's case was undisputed. Here, as in Eberhardt, the defendant's alibi defense, "though far from undisputable, was consistent and credible enough that it might have been accepted by a reasonable juror, absent the prosecutor's improper remarks." Eberhardt at 280. This factor also indicates that the present error was not harmless.

Another factor is whether the error could reasonably be viewed as eradicated by the rulings and instructions of the trial court. In the present case, as in Eberhardt, the trial court "did not give a strong, prompt instruction to the jury, explaining the defendant's right not to testify and admonishing it to disregard the prosecutor's comments." Eberhardt at 280. Instead, the trial court merely denied the motion for mistrial

and the trial continued. This is another indication that the error was not harmless.

A fourth factor to consider is whether the trial was otherwise relatively error-free. In the present case, there were numerous errors other than the improper comment error. The Arizona Court of Appeals reversed Petitoner's conviction because the trial court improperly admitted evidence of a witness' refusal to submit to a polygraph examination and did not rule on other errors raised on appeal. See, Ikirt at 1161-1162. The Arizona Supreme Court ruled that the polygraph issue was waived but later reversed because of the improper comment. Neither court reached the other errors raised in the appeal.

The cumulative effect of these errors is a proper factor to be weighed in the harmless error balance. Eberhardt at 280. This factor also indicates that the present error was not harmless.

In the present case, as in Eberhardt, the only factor weighing in favor of a finding of harmless error is the fact that the prosecutor's comments were relatively brief and not repeated. However, it only takes a single comment "to remind a jury that the defendant has not testified and to fix in the jurors' minds the impermissible inference that the defendant is guilty merely because of the exercise of that right." Eberhardt at 279 (citing Rachel v. Bordenkircher, 590 F.2d 200 (6th Cir. 1978).

The Arizona Supreme Court ruled that the prosecutor's comment in the present case was prejudicial and entitled Petitioner to a new trial. The Arizona court's holding is amply supported by the record under review. That court's findings should be given great weight. It must be fairly said that there is a reasonable possibility that the prosecutor's improper comment contributed to the jury's verdict. Therefore, this Court

should find that the state failed to carry its heavy burden of demonstrating that the constitutional error in this case was harmless beyond a reasonable doubt under Chapman.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari in that the Arizona Supreme Court's decision is clearly and expressly based upon independent state grounds. Those independent state grounds are A.R.S. Sec. 117(B) and Article 2, Section 10 of the Arizona Constitution, both of which predate Griffin v. California.

In addition, this Court should deny the Petition for Writ of Certiorari for the reason that the prosecutor's comment upon the defendant's ability to testify clearly constituted fundamental error. The Arizona Supreme Court was correct in finding that the fundamental error was not harmless under the circumstances of this case.

RESPECTFULLY SUBMITTED this 9 day of June, 1989.

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BY: _____
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